Michigan Campaign Finance Network

July 31, 2009

The Honorable Marilyn Kelly
Chief Justice
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48009

RE: Comment of the Michigan Campaign Finance Network on Campaign Spending and Disqualification of Supreme Court Justices

Dear Chief Justice Kelly:

In the case of *Caperton v. Massey Coal Company*, the United States Supreme Court held that it is unconstitutional for an elected judge to participate in a case involving an extraordinary financial supporter of the judge's election campaign. The Court ruled that the probability of bias violated the due process right of the campaign supporter's legal opponent to an impartial judicial hearing.

Importantly, the extraordinary spending in *Caperton* involved independent expenditures, not a contribution directly to the judge's campaign committee. Therefore, the constitutional requirement for an elected judge to disqualify himself from a case involving his extraordinary campaign finance supporter is relevant to campaign spending in its many forms, not just contributions directly to the judge's campaign committee.

In writing for the 5-4 majority, Justice Anthony Kennedy observed, "Because the States may have codes of conduct with more rigorous recusal standards than due process requires, most recusal disputes will be resolved without resort to the Constitution, making the constitutional standard's application rare."

It is in this context that the Michigan Campaign Finance Network (MCFN) offers its comments on the Proposals Regarding Procedure for Disqualification of Supreme Court Justices.

Summary of Michigan Supreme Court Campaign Finances, 2000-2008

Throughout the decade from 2000 through 2008, more than $30 million was spent in Michigan Supreme Court election campaigns.

The candidate committees of the major party nominees raised $13.1 million, all of which is disclosed in campaign finance reports received and maintained by the Bureau of Elections. Contributions to candidate committees are subject to limits of $3,400 from an individual, $34,000 from an independent political action committee (PAC) and $68,000 from a political party's state committee.

Independent PACs, the Michigan Democratic Party and the Michigan Republican Party made independent expenditures in the amount of $3.3 million that are disclosed in the organizations' respective campaign finance reports. There are no limits on contributions to Michigan PACs or party committees, although contributions from the general treasuries of corporations or unions are prohibited. Independent expenditures can not be limited.

The greatest share of Supreme Court campaign spending over the decade was used to purchase candidate-focused electioneering communications, or "issue" advertisements. These are the advertisements that seek to define the candidates' records, character, qualifications and suitability for office, while avoiding explicitly exhorting a vote for or against a candidate. There is no disclosure of this spending, or the underlying contributions that support it, in campaign finance records. This is because these advertisements are not considered to be campaign expenditures under the prevailing interpretation of the Michigan Campaign Finance Act. There are no limits on contributions to committees that sponsor candidate-focused issue advertisements and no operational prohibitions against funds from corporate or union general treasuries. MCFN collects data on these expenditures from the public files of the state's broadcasters and cable systems and estimates that Supreme Court television issue advertisements totaled $14.3 million from 2000 through 2008. MCFN has no estimate for radio issue advertisements.

The 2008 Michigan Supreme Court campaign illustrates what has become a customary campaign finance structure. The candidates raised $2.7 million, PACs and the parties made $1 million in reported independent expenditures, and the Michigan Chamber of Commerce and the Michigan Democratic and Republican Parties bought $3.8 million worth of television issue advertisements. The campaign spending from all sources totaled $7.5 million, and $3.8 million – over half of all spending – was outside the campaign finance reporting system.

Citizens' Perspectives on Campaign Spending and Judicial Bias

In March 2009, MCFN commissioned a statewide poll of 600 randomly selected voters that asked questions on the subject of campaign spending and judicial bias. Among the key findings:

- Ninety-six percent of Michigan voters said it is important that all sources of spending for judicial election campaigns are publicly disclosed.
- Ninety-three percent of Michigan voters said it is important that judges are independent of influence from financial supporters of their election campaigns.
- Sixty-seven percent of Michigan voters doubt a judge's ability to be fair and impartial in a case where one of the parties spent $50,000 to support the judge's election.
- Seventy-seven percent of Michigan voters doubt a judge's ability to be fair and impartial in a case where one of the parties spent $1 million to support the judge's election.
- Eighty-five percent of Michigan voters believe that a judge should not hear a case that involves a party who has spent $50,000 to support his election.

Campaign Spending and Supreme Court Disqualification

MCFN urges the Michigan Supreme Court to establish recusal rules that take into account campaign spending. We believe that this is important for maintaining public trust and confidence in the fairness and impartiality of the Court.

We encourage the Court to set a bright-line standard for campaign spending that would trigger automatic disqualification. The American Bar Association's Model Code of Judicial Conduct recommends that state courts adopt a bright-line *contribution limit* appropriate to their state. But the lesson of *Caperton* is that the probability of bias is a function of campaign spending in all its forms, not just contributions directly to a candidate committee. A bright-line standard would provide guidance to committees and individuals who spend independently in campaigns, so they clearly understand that there are limits on the financial support they can provide to a justice if they want that justice to hear their case. Furthermore, a justice might still disqualify himself from a case involving a financial supporter whose campaign spending falls short of the bright-line standard. The justices would retain the discretion to recuse themselves voluntarily whenever they feel their ability to participate impartially in a case has been compromised or might appear to have been compromised.

The great challenge in developing an effective disqualification rule that considers campaign spending is that a great proportion of spending for recent Supreme Court election campaigns has been off the books. Spending for candidate-focused issue advertising is typically greater than the spending by the candidates' own campaign

committees, and candidate-focused issue advertisements are outside the State's campaign finance reporting regime. To assure that the Court considers all relevant campaign spending, MCFN recommends that the Court require all parties who appear before it, including counsel, to submit affidavits listing all contributions they have made to the candidate committees of any justices, and to the committees that sponsor on-the-record independent expenditures and off-the-books issue advertisements. All such spending is relevant and should be considered.

A disqualification rule that considers campaign spending must include defenses against those who would 'game' the system. False positives should be precluded. For example, a prospective appellant or counsel could spend more than the bright-line amount to support the campaign of a justice in order to try to force that justice off his future case. In such circumstances, the spender's opponent in the case should be given the opportunity to waive the disqualification. Or, if an individual or interest group spends more than the bright-line amount to defeat a candidate and fails, the unsuccessful spender has no right to expect recusal because he believes the justice he failed to eliminate must harbor prejudice against him. This is a situation where a duty to sit should control the situation, unless the justice voluntarily recuses because he detects bias within himself that would preclude an impartial hearing. Otherwise, prospective participants in cases could be forcing disqualification at will. There is a difference in kind between successful support, where a justice may owe the winning of his seat to a financial supporter, and failed opposition, where the unsuccessful opponent has not materially changed the circumstance of the justice holding his seat.

Finally, as a procedural matter, we believe that a disqualification motion should be acknowledged and answered by the justice who is being asked to recuse himself. If the motion is denied, the maker of the motion should have the right to appeal to a panel of the justice's peers. Not only is the right to appeal fundamental to jurisprudence, it resonates with the citizens of this state. In the March 2009 MCFN poll, 86 percent of Michigan voters said that some other judge should have the final word in a case where a judge is asked to disqualify himself because of perceived bias. Only seven percent said that the judge who is asked to disqualify himself should have the final say.

We are grateful to the Court for taking up the important issue of disqualification and giving the public the opportunity to comment. We are hopeful that the Court will establish the rigorous recusal standards that Justice Kennedy contemplated in the *Caperton* opinion.

Sincerely,

Richard L. Robinson
Executive Director
Michigan Campaign Finance Network

CC: Corbin R. Davis, Clerk of the Supreme Court